PD-0771&0772&0773-16
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 12/1/2016 4:36:10 PM
Accepted 12/2/2016 8:38:52 AM
ABEL ACOSTA
CLERK

In the
Court of Criminal Appeals
for the State of Texas

FILED
COURT OF CRIMINAL APPEALS
12/2/2016
ABEL ACOSTA, CLERK

NO. PD – 0771 – 16
NO. PD – 0772 – 16
NO. PD – 0773 – 16

Andrew Pete, Respondent
vs.
State of Texas, Petitioner

From the Court of Appeals for the Fifth District of Dallas
In Cause Nos. 05-15-01521, 05-15-01522, and 05-15-01523

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Defendant, Andrew Pete, was indicted in the above entitled cause(s) and proceeded to a jury trial on April 22, 2015. Defendant was found guilty in all three (3) causes wherein he was remanded to the custody of the Dallas County Sheriff.[1] During the punishment phase of the trial, the trial court granted a mistrial.[2] In granting said mistrial, the Court declared the mistrial be limited to the punishment phase only.[3]

On December 4, 2015, Defendant filed a Writ of Habeas Corpus and Motion to Reinstate Bond, specifically contending the trial court did not have the authority to limit the Order granting mistrial to the punishment phase only and that the case be restored to its original posture and Defendant's bonds be reinstated.[4] The Court issued an Order denying said request.[5]

On December 14, 2015, Defendant filed a Notice of Appeal to the denial of said Writ wherein the Fifth District Court of Appeals reversed the trial court's order denying habeas corpus relief and remanded the cases for further proceedings.[6]

[1] C.R. at 15, 91; 2 C.R. at 14, 70; 3 C.R. at 14, 91.
[2] 7 R.R. at 85-88.
[3] 7 R.R. at 131.
[4] 1 C.R. at 108-11; 2 C.R. at 101-04, 3 C.R. at 109-12.
[5] 1 C.R. at 115; 1 C.R. at 79; 3 C.R. at 91.
[6] *Ex Parte Pete*, Nos. 05-15-01521-CR, 05-15-01522-CR, 05-15-01523-CR, 2016 Tex.App. LEXIS 6088 (Tex.App. – Dallas June 8, 2016, pet. filed) (mem. op., not designated for publication).

ISSUE PRESENTED (RESTATED)

Did the Court of Appeals err in concluding a trial court does not have authority to limit a mistrial to the punishment phase only?[7]

[7] The issue referenced above was the matter taken up by the Court of Appeals. Petitioner has presented a different issue in his Opening Brief.

SUMMARY OF THE FACTS

Respondent proceeded to trial on three (3) charges of aggravated sexual assault wherein a jury found him guilty.[8] During the punishment phase, the jury heard testimony from several witnesses; however, when Respondent got up to testify, the jury saw that he was wearing shackles.[9] The trial court ordered the bailiff to escort the jury out and recessed proceedings for an hour.[10] When the trial resumed, Respondent, outside the presence of the jury, moved for a mistrial.[11] The trial court initially took the motion for mistrial under advisement and ordered the trial continue with Respondent's testimony.[12] When Respondent's testimony concluded, the court again recessed for an hour before returning and granting Respondent's motion for mistrial as to the punishment phase only.[13] Respondent therein filed an application for writ of habeas corpus and motion to reinstate bond, asserting the trial court lacked authority to grant a mistrial as to the punishment phase only.[14] The trial court denied Respondent's application for habeas relief. Respondent appealed to the Fifth District Court of Appeals wherein they reversed and remanded the trial court's order.[15]

[8] 1 C.R. at 91; 2C.R. at 79; 3 C.R. at 91.
[9] 7 R.R. at 85-88.
[10] 7 R.R. at 85.
[11] 7 R.R. at 86.
[12] 7 R.R. at 90-91.
[13] 7 R.R. at 131.
[14] 1 C.R. at 108-11; 2 C.R. at 101-04, 3 C.R. at 109-12.
[15] *Pete*, 2016 Tex.App. LEXIS 6088.

SUMMARY OF THE ARGUMENT

The Court of Appeals did not err when it reversed the trial court's order denying Respondent's Writ of Habeas Corpus. Specifically, the Court of Appeals properly found the trial court lacked authority to grant a mistrial as to the punishment phase and correctly held the post-verdict mistrial returned the cases back to their original posture before trial commenced.[16]

Similarly, the Court of Appeals did not err in finding Petitioner's arguments misplaced and inapplicable. *Id*. Specifically, Petitioner cited to Tex. R. App. P. 21.9 (a), to support their argument that the trial court *had* authority to order a mistrial as to the punishment phase. The Court of Appeals correctly stated held Rule 21 inapplicable because punishment had not been assessed to qualify for a "new trial on punishment". *Id*.

Petitioner has since abandoned the argument the trial court *had* authority. Petitioner now argues the trial court properly denied Respondent's application because no law *restricts* the trial court's discretion. Respondent respectfully disagrees on two (2) grounds. First and foremost, multiple Court of Appeals have held a trial court "lacks" authority to limit a mistrial to the punishment phase.[17] Secondly, Respondent directs the Court to its prior decision under *State v. Hight*, 907 S.W.2d 845 (Tex. Crim App. 1995), not to discern whether "new trials" on punishment were proper before or after amendments to Rule 21, but to apply the same rationale it used in considering a trial court's authority – "had the legislature intended for trial courts to have such authority, they would have included "trial courts" in …. said article. *Id*. at 846, 847.

Furthermore, the Court of Appeals properly considered several cases from this Court and various districts to support their Opinion. In said cases, *all* of the Courts found it proper procedure

[16] *Pete*, 2016 Tex. App. LEXIS 6088 at *1

[17] *Bounhiza*, 294 S.W.3d at 786; and *Huseman*, 17 S.W.3d 704 (Tex.App. – Amarillo, 1999) [holding trial court had no authority to grant a mistrial limited to the punishment phase only after plea of guilty].

for an order granting a "post-verdict mistrial" to return the case back to its original posture before trial commenced.[18] These cases included a decision made subsequent to Rule 21 being amended and certainly contemplated said Rule in making their decision.[19] However, it goes without saying, Petitioner has not, will not, and cannot direct this Court to a single case (before or after said amendment) where a post-verdict mistrial was granted and limited to the punishment phase only; such case does not exist and Respondent argues this case should not be the first.

STANDARD OF REVIEW

This appeal is predicated upon (1) legal determination – does the trial court have authority to limit an Order granting a mistrial to the punishment phase only? The Court of Appeals properly applied a *de novo* standard of review since the trial judge was not in an appreciably better position, than the reviewing court, to make a legal determination.[20]

[18] *See State v. Evans*, 843 S.W.2d 576 (Tex.Crim.App. 1992) [citing to *State v. Garza*, *774 S.W. 2d 724* (Tex.App.—Corpus Christi, 1989 no pet.); *State v. Boyd*, 202 S.W.3d 393 (Tex.App. – Dallas, 2006); *State v. Garza, 774 S.W. 2d 724* (Tex.App.—Corpus Christi, 1989 no pet.); *State v. Bounhiza*, 294 S.W.3d 780, 786 (Tex.App. – Austin, 2009); *State v. Huseman*, 17 S.W.3d 704 (Tex.App. – Amarillo, 1999); and *State v. Doyle*, 140 S.W. 3d 890 (Tex.App. – Corpus Christi, 2004).

[19] *State v. Bounhiza*, 294 S.W.3d 780, 786 (Tex.App. – Austin, 2009).

[20] *Pete*, 2016 Tex. App. LEXIS 6088 at *1 [citing to *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997).

ARGUMENT AND AUTHORITIES

The Court of Appeals did not err when it found the trial court lacked authority to grant a mistrial as to the punishment phase only and correctly held the post-verdict mistrial returned the cases back to their original posture before trial commenced.[21]

I. TRIAL COURTS DO NOT HAVE AUTHORITY TO GRANT A MISTRIAL AS TO THE PUNISHMENT PHASE ONLY

The trial courts have not been vested with any authority to declare a mistrial as to punishment. To the contrary, several Court of Appeals have held the exact opposite - a trial court "lacks" authority to limit a mistrial to the punishment phase.[22] There is no legal authority indicating otherwise. In fact, Petitioner has failed to cite a single case supporting the proposition that a mistrial has *ever* been limited to punishment; likely because said application is unprecedented.

On the other hand, Respondent directs your attention to this Court's decision in *State v. Hight*[23] to support its position that a trial court lacks authority to grant a mistrial to punishment only. In *Hight*, this Court dealt with a very similar issue concerning a trial court's "authority" *and* "new trials on punishment". Specifically, at the time of its decision (*prior to the amendment to Rule 21*), new trials as to punishment were specifically delineated to the Court of Appeals. However, a trial court (likely exercising its "discretion") declared a new trial as to punishment on grounds of judicial economy and public policy.[24] This Court rejected that argument and held the trial court did not have authority to declare a new trial as to punishment, further stating "if the legislature had

[21] *Pete*, 2016 Tex. App. LEXIS 6088 at *1
[22] *Bounhiza*, 294 S.W.3d at 786; and *Huseman*, 17 S.W.3d 704 (Tex.App. – Amarillo, 1999) [holding trial court had no authority to grant a mistrial limited to the punishment phase only after plea of guilty].
[23] *Hight v. State,* 907 S.W.2d 845 (Tex. Crim App. 1995).
[24] *Id.*, supra at 846.

so intended, they could have, and surely would have, included "trial courts" to the article concerning new trials on punishment.[25]

Respondent submits the same argument here – if the legislature had intended on extending the trial court's authority as to mistrials and punishment, they certainly would have done so. In fact, they had ample opportunity to do so when they amended the trial court's authority as to new trials in 2007. Accordingly, the Court of Appeals properly found the Court had no such authority to do so in this case.

II. THE COURT OF APPEALS DID NOT ERR IN HOLDING TRIAL COURTS DO NO HAVE AUTHORITY TO GRANT A MISTRIAL AS TO PUNISHMENT

Petitioner asserts the Court of Appeals erred when it found the trial court did not have the authority to limit the order granting mistrial to the punishment phase; however, the Court of Appeals relied on several cases in determining the trial court cannot operate without authority; specifically, trial courts cannot limit a mistrial to the punishment phase.[26]

A. The Court of Appeals did not apply the wrong analysis.

Petitioner argues the Court of Appeals applied the wrong analysis in considering whether the trial court had authority to limit a mistrial as to punishment – and instead suggests the Court of Appeals should have considered *whether any law limited the trial court's discretion* in declaring a mistrial as to punishment. However, even under that analysis, the Court of Appeals would have likely come to the same conclusion by taking notice of the three (3) *other* district Court of Appeals

[25] *Hight* at 846.

[26] *Bounhiza*, 294 S.W.3d at 786; and *Huseman*, 17 S.W.3d 704 (Tex.App. – Amarillo, 1999) [holding trial court had no authority to grant a mistrial limited to the punishment phase only after plea of guilty].

who concluded the same thing – "trial courts have no such authority". [27] Furthermore, the Court of Appeals certainly wouldn't have found any decisions to support Petitioner's argument.

Petitioner cites to *Rodriguez v. State*,[28] to support its position that a trial court's discretion can supersede any lack of authority; however, Petitioner's analysis of said decision is misplaced. First and foremost, *Rodriguez* was a case of first impression [literally] – unlike this case, not a single Court of Appeals decision had ever been rendered on the issue at hand. As such, this Court had to use analogies to issue its opinion. Secondly, the holding in *Rodriguez* concerns the trial court's authority to rescind an order granting a mistrial; specifically, whether a trial court can do so *during* the guilt innocence phase, *before* the jury is discharged and made aware of what occurred. In fact, *Rodriguez* acknowledges a distinction in application when granting a *post-verdict mistrial* where the verdict of guilty would have been set aside. As such, the Court of Appeals applied the proper analysis in concluding the trial court lacked authority.

B. The Court of Appeals did not err in holding a mistrial could not be limited to the punishment phase.

Petitioner argues the trial court correctly limited the mistrial to the punishment phase because no controlling authority limits the trial court's discretion.[29] That is simply not true. In *Bullard v. State* this Court was clear – "all proceedings before the granting of the mistrial become legally ineffective and the case stands as it did before the mistrial was declared".[30] This is the controlling authority, irrespective of whether a bi-furcated system was in place or not.

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[27] *Bounhiza*, 294 S.W.3d at 786; and *Huseman*, 17 S.W.3d 704 (Tex.App. – Amarillo, 1999) [holding trial court had no authority to grant a mistrial limited to the punishment phase only after plea of guilty].
[28] *Rodriguez v. State*, 852 S.W.2d 516 (Tex. Crim. App. 1993).
[29] *See* STATE'S OPENING BRIEF, p. 15.
[30] *See Bullard v. State*, 331 S.W.2d 222, 223 (Tex. Crim. App. 1960).

Petitioner further argues the trial court operated within its discretion by limiting the mistrial to the punishment phase – with support from caselaw and statues.[31] That is also not true. There is no such caselaw or statute to support the trial court's decision to limit a post-verdict mistrial to punishment only.

1. Texas law does <u>not</u> provide the guilt-innocence verdict shall stand when a mistrial is declared during the punishment phase.

Texas law provides the exact opposite of what Petitioner suggests in his Opening Brief. Mistrials declared prior to the imposition of a sentence (after a finding of guilt) return the case back to its original posture before trial commenced.[32]

Petitioner insists the Court of Appeals erred in relying on *Huseman* and *Bounhiza*,,[33] specifically stating as follows:

> "To the extent the Court of Appeals relied on those cases as well, it was error. Those cases relied on old law, from *before* a trial court could grant a new trial on punishment only."

Similarly, Petitioner goes on further to state *Bounhiza* "… did not consider how Rule 21 had changed". [34] However, this could not be any further from the truth. The *Bounhiza* decision was not only issued subsequent to the amendment to Rule 21, but the Court contemplated such amendment in holding the trial court did not have any authority to grant a mistrial as to punishment only.[35] Contrary to Petitioner's suggestion, the law supports Respondent – a guilty verdict shall be set-aside upon a mistrial being declared during the sentencing phase.

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[31] *See* STATE'S OPENING BRIEF, p. 15.
[32] *See Bounhiza*, 294 S.W.3d 780; *Huseman*, 17 S.W.3d 704 (Tex.App. – Amarillo, 1999); and *Garza, 774 S.W. 2d 724, 726* (Tex.App.—Corpus Christi, 1989 no pet.) [holding a post-verdict mistrial returned the case back to its original posture, setting aside the guilty verdict and ordering a new trial granted].
[33] *See* STATE'S OPENING BRIEF, p. 22.
[34] *See* STATE'S OPENING BRIEF, p. 24-25.
[35] *See Bounhiza*, 294 S.W.3d 780, 786 (Tex.App. – Austin, 2009).

In light of the unfavorable case law, Petitioner asks this Court to consider applying alternatives: Tex. Code. Crim. Proc., Article 44.29 (b) *or* TEX. R. APP. P. 21.1 (b) (hereinafter "Rule 21"). Article 44.29 does enable the courts to preserve a jury's guilty verdict; however, that article only applies *after* a "new trial" has been awarded.[36] As Petitioner notes, new trials are only considered after the trial has been completed.[37] It goes without saying, this trial was not completed and Respondent certainly didn't petition the trial court on a motion for new trial. As such, Article 44.29 is misplaced.

As to Rule 21, Petitioner argues trial courts are now permitted to conduct a "new trial on punishment" if a meritorious ground exists as to the punishment phase; however, Rule 21 cannot be implicated here. As Petitioner notes, this Rule only applies "after the trial court has, on defendant's motion, set aside an assessment of punishment".[38] Accordingly, this Rule cannot be applied since punishment was not rendered and/or set aside.

Lastly, Petitioner states "public policy requires all courts to respect lawful jury verdicts when those verdicts are not affected by the punishment phase". Respondent would argue public policy also requires trial courts respect the law – especially when the law dictates guilty verdicts be set aside when a mistrial is granted before punishment has been assessed.[39] In fact, many courts, including this Court, have set-aside a jury verdict of guilty when trial courts have acted without authority.[40] The Court should do the same here, as the trial court did not have authority to impose a limitation to the order granting mistrial.

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[36] Tex. Code. Crim. Proc. Art 44.29 (b) (West 2014).
[37] *See* STATE'S OPENING BRIEF, p. 19.
[38] TEX. R. APP. P. 21.1 (b).
[39] *See Bounhiza*, 294 S.W.3d 780; *Huseman*, 17 S.W.3d 704 (Tex.App. – Amarillo, 1999); and *Garza, 774 S.W. 2d 724, 726* (Tex.App.—Corpus Christi, 1989 no pet.)
[40] *State v. Boyd*, 202 S.W.3d 393 (Tex.App. – Dallas, 2006); *Garza, 774 S.W. 2d 724* (Tex.App.—Corpus Christi, 1989 no pet.); *Bounhiza*, 294 S.W.3d 780, 786 (Tex.App. – Austin,

2. Post-Verdict mistrials are <u>not</u> the equivalent of New Trials on Punishment

Mistrials, by definition, are those trials a judge brings to an end, without a determination on the merits because of a procedural error or serious misconduct occurring during the proceedings.[41] As previously noted, when a mistrial is declared, the proceedings before the granting of the mistrial become legally ineffective and the case stands as it did before the mistrial was declared.[42] This is not just Texas law; there are other states who have declared a "mistrial is in essence a conclusion of law that no trial had taken place."[43]

Petitioner provides a sweeping analysis of case law concerning mistrials and the court's discretion in declaring said mistrials.[44] Petitioner states that a mistrial is reserved for a narrow class of incurable errors and upon being granted "halt[s] a trial" when said error is so prejudicial.[45] Respondent couldn't agree more; that's the point – the trial [in its entirety] is *over* the moment the prejudicial error occurs and no such distinction can be made by Petitioner or any other Court to suggests said "halt" only applies to the punishment phase.

In *Ocon v. State*, this Court held, "while motions for new trial and motions for mistrial may be "functionally indistinguishable," they are not identical."[46] As Petitioner notes, the difference is

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2009); *Huseman*, 17 S.W.3d 704 (Tex.App. – Amarillo, 1999); and *Doyle*, 140 S.W. 3d 890 (Tex.App. – Corpus Christi, 2004).

[41] Black's Law Dictionary (10th ed. 2014)

[42] *See Bullard*, 331 S.W.2d 222, 223 (Tex. Crim. App. 1960).

[43] *See Villander v. Hawkinson* (1958), 183 Kan. 214. 326 P. 2d 273; *see also Cook v. State*, 281 Md. 665, 670-71, 381 A.2d 671, 674 (1978).

[44] *See* STATE'S OPENING BRIEF, p. 12 (citing to *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007); and *Wood v. State*, 18 S.W.3d 642, 648 (Tex Crim App. 2000).

[45] *Id.*

[46] *Ocon v. State*, 284 S.W3d 880, 884 n.1 (Tex. Crim. App. 2009).

timing.[47] In order for a new trial on punishment to be considered, a trial must have concluded for the judgment to be set aside.[48]

With that being said, Respondent agrees they are "functionally" indistinguishable because they both return the case back to its original posture, upon a finding that the trial court acted without authority.[49] To be clear, this Court has ruled when a trial court acts without authority, the guilty verdict shall be set aside and the case returned to its original posture before trial.[50]

That's why Petitioner's reference to *State v. Davis* is misplaced. In *Davis*, this Court simply applied Rule 21 to reflect the authority the trial court had been given by the legislature in 2007.[51] Respondent argues no such authority exists as to mistrials; and because no authority vests the trial courts with the ability to limit a mistrial to punishment, this Court should fall back on its prior reasoning in *Hight* and look to the legislative intent (or lack thereof) in determining whether trial courts have authority to limit a mistrial as to punishment. In doing so, this Court will determine you cannot apply Rule 21 to deduct the trial court's authority as to mistrials during punishment.

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[47] *See* STATE'S OPENING BRIEF, p. 19.
[48] TEX. R. APP. P. 21.1 (b).
[49] *See Hight v. State*, 907 S.W.2d 845 (Tex. Crim App. 1995); *Bounhiza*, 294 S.W.3d at 786; and *Huseman*, 17 S.W.3d 704 (Tex.App. – Amarillo, 1999) [holding trial court had no authority to grant a mistrial limited to the punishment phase only after plea of guilty].
[50] *See Hight v. State*, 907 S.W.2d 845 (Tex. Crim App. 1995).
[51] *See State v. Davis*, 249 S.W3d 535 (Tex. Crim. App. 2014).

PRAYER

Pursuant to the aforementioned, Respondent, Andrew Pete respectfully prays this Court uphold the Court of Appeals decision and return the case to its original posture to proceed with a new trial. Mr. Pete further prays for any and all other relief as appropriate and to which he is entitled.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 4,064 words. This word count includes all necessary parts outlined in Texas Rule of Appellate Procedure 9.4(i)(1) and it was conducted with Microsoft Word.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above foregoing brief was served via electronic service to Brian Higginbotham at the Dallas County Assistant District Attorney's Office and State Prosecuting Attorney (information@spa.texas.gov) on this the 1st day of December, 2016.

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